

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

CENTRAL STATES, SOUTHEAST AND
SOUTHWEST AREAS PENSION FUND,
CENTRAL STATES, SOUTHEAST AND
SOUTHWEST AREAS HEALTH AND WELFARE
FUND, and HOWARD McDOUGALL, trustee,

Plaintiffs,

v.

AGL RESOURCES, INC., a Georgia Corporation;
NUI CAPITAL CORP., a Florida corporation; and
PIVOTAL UTILITY HOLDINGS, INC.,
f/k/a NUI UTILITIES, INC., a New Jersey corporation,

Defendants.

Case No. 07 C 6933
Judge Blanche M. Manning
Magistrate Judge Denlow

PLAINTIFFS' MOTION TO DISMISS COUNTERCLAIM

Plaintiffs, Central States, Southeast and Southwest Areas Pension Fund ("Pension Fund"), Central States, Southeast and Southwest Areas Health and Welfare Fund ("Health and Welfare Fund") and Howard McDougall, trustee (collectively "Central States"), hereby move this Court pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure to dismiss the Defendants' Counterclaim. In support thereof, Plaintiffs state the following:

1. On February 1, 2008, Plaintiffs filed a First Amended Complaint against Defendants AGL Resources, Inc. ("AGL"), NUI Capital Corp. ("NUI"), and Pivotal Utility Holdings, Inc., f/k/a NUI Utilities, Inc. ("Pivotal") in accordance with the provisions of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §1001, *et seq.*, as amended by the Multiemployer Pension Plan Amendments Act of 1980. In the Complaint, Central States seeks to collect contributions based upon an audit of Defendants

NUI's and Pivotal's records. As the parent company of Defendants NUI and Pivotal, Plaintiffs allege that Defendant AGL is liable for the debts of its two subsidiaries.

2. On February 17, 2008, Defendants served their Answer To First Amended Complaint which included Defendants' Counterclaim Against Plaintiffs. The Counterclaim purports to state a claim for conversion against Plaintiffs. Defendants allege that they paid Plaintiffs \$50,000 "to offset any possible underpayments [to the Funds revealed by the audit]." (¶ 4 of Counterclaim). The Defendants allege that they subsequently sent a letter to the Funds "explaining that they owed only \$6,430.00 ... [and] requested that Plaintiffs/Counter-Defendants return the remaining [\$43,570 of the \$50,000 payment to the Defendants]." (¶ 6 of Counterclaim). The Defendants assert that Central States failed to comply and has thereby improperly converted the \$43,570 that belongs to the Defendants.

3. Rule 12(b)(6) authorizes the court to dismiss any counterclaim that fails to state a claim.

4. Defendants do not allege a jurisdictional basis for the conversion counterclaim. They allege that the Counterclaim is brought "pursuant to Federal Rule of Civil Procedure 13. Thus, the Defendants' counterclaim is a state law claim over and they assert this court has supplemental jurisdiction under 28 U.S.C. ¶ 1367.

5. There are two insurmountable obstacles to the Counterclaim. First, under 29 U.S.C. ¶ 1144, state law is preempted by ERISA. Therefore, the state law conversion claim does not exist. Second, a claim for conversion usually relates to tangible property, not money. In order to establish the conversion of money the Defendants, must be seeking a specific, segregated account and not merely a particular amount of money. The Defendants do not allege the existence of a specific account because the money because they know none exists.

WHEREFORE, Central States respectfully requests that the Defendants' Counterclaim be dismissed.

Respectfully submitted,

March 3, 2008

s/ Rathna C. Rodgers
Rathna C. Rodgers (ARDC #06239131)
Attorney for Plaintiffs
Central States, Southeast and Southwest
Areas Pension Fund, Central States, Southeast
and Southwest Areas Health and Welfare Fund
9377 West Higgins Road
Rosemont, Illinois 60018
(847) 518-9800, Ext. 3435
rrogers@centralstatesfunds.org

CERTIFICATE OF SERVICE

I, Rathna C. Rodgers, one of the attorneys for Plaintiffs, Central States, Southeast and Southwest Areas Pension Fund, certify that on March 3, 2008, I caused the foregoing Notice of Motion, Plaintiffs' Motion To Dismiss Counterclaim and Plaintiffs' Memorandum in Support of Motion to Dismiss Counterclaim to be filed electronically. This filing was served on all parties indicated on the electronic filing receipt via the Court's electronic filing system.

s/ Rathna C. Rodgers

Rathna C. Rodgers (ARDC #06239131)
One of Central States' Attorneys